BLANK PAGE

LANK PAGE

INDEX

CITATIONS

297491—41——1

Cases—Continued.

Miscellaneous—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 550

EARL MOORE, PETITIONER

v.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

THE QUESTION TO BE CONSIDERED IN THIS MEMORANDUM

One of the issues in this case upon which the Court may find it necessary to pass is whether a person claiming rights under a collective bargaining agreement between a railroad and its employees may bring suit for breach of the agreement in the courts without first instituting proceedings before the National Railroad Adjustment Board. Decision of this question rests largely

upon the intention of Congress in amending the Railway Labor Act in 1934 so as to create the National Railroad Adjustment Board. It is the purpose of this memorandum to bring together for the information of the Court the facts as to the legislative and historical background of the amendment, and also to suggest the considerations involved in the question of statutory construction. The issue here considered is to be distinguished from another question raised in the case—whether an employee must, as a matter of contract law, avail himself of the remedial machinery established by a collective bargaining agreement before suing in court.[1]

STATUTE INVOLVED

The statute involved is the Railway Labor Act as amended June 21, 1934 (c. 691, 48 Stat. 1185, 45 U. S. C., Secs. 151–163), and particularly Section 3 thereof, which creates and defines the powers of the National Railroad Adjustment Board. The entire Act is printed at pp. 74–87 of the Appendix to a compilation of material on the Adjustment Board entitled "Inquiry of the Attorney General's Committee on Administrative Procedure relating to the National Railroad Adjustment Board, and Historical Background and Growth of Machinery

[1] Although it has been said that the provisions of the Railway Labor Act are to be regarded as incorporated in railroad collective bargaining agreements, this does not help in determining how the statute is to be construed before it is given such effect.

Set Up for the Handling of Railroad Labor Disputes, 1888–1940" (hereinafter referred to as *Compilation*) copies of which will be distributed to the Court.[2]

STATEMENT

The facts, insofar as relevant to the point here to be considered, are as follows:

Petitioner, Earl Moore, was a switchman employed in the Jackson Yards of the Alabama and Vicksburg Railway Company (R. 103) and a member of the Switchmen's Union of North America, which had negotiated the agreement for yardmen on that carrier (R. 112, 136). In June 1926 respondent, Illinois Central Railroad Company, took over the operations of the Alabama and Vicksburg; the Illinois Central had a contract covering yardmen with the Brotherhood of Railroad Trainmen (R. 112, 162). Through negotiations with the Brotherhood, but not with the Switchmen's Union, the seniority rosters in both the old and new Jack-

[2] This volume is a compilation of most of the pertinent documentary material relating to the National Railroad Adjustment Board. It contains in full the reports of and proceedings before the Attorney General's Committee on Administrative Procedure dealing with the Adjustment Board, and reprints the executive orders, collective labor agreements and statutes disclosing the history of the Adjustment Board and also the leading speeches and articles describing its operation. This publication was compiled by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, New York City. Most of the documents hereinafter referred to are printed in the Appendix to the volume (the *pink* pages).

son yards of the Illinois Central were consolidated (R. 110–111, 162–3, 137, 133, 168). Petitioner continued to work for the carrier, but was idle at times as a result of a consequent reduction in his seniority listing (R. 45–46). In 1932 he brought suit in the state courts of Mississippi for damages for this partial unemployment (R. 113, 42). This suit was unsuccessful, the State Supreme Court holding that he had accepted his new seniority rating by continuing to work for the company for a number of years after it had been promulgated (R. 48–52). In February 1933 petitioner was discharged (R. 96, 115). Although the company claimed that he was discharged because of slowness and irregularity in his work, the District Court in this case found that in fact he was discharged for having sued the company (R. 201).

After 1926 he joined the Brotherhood of Railroad Trainmen but was expelled from that organization for non-payment of dues (R. 112, 165, 167). He continued to be represented before the carrier by the head of the local branch of the Switchmen's Union (R. 112, 116, 136).

After his discharge petitioner was given a hearing by the Superintendent, but to no avail (R. 115–118). He then filed this suit in the Mississippi courts for breach of Article 22 D (R. 15) [3] of the

[3] This paragraph of the agreement reads as follows (R. 15):

Yardmen or switchtenders taker out of the service or censured for cause, shall be notified by the Company of the

agreement between the carrier and the Brotherhood, claiming that he had been unjustly dismissed from service and was entitled to be paid for time lost (R. 1–3).

After the petitioner had lost in the Mississippi Circuit Court, obtained a reversal and remand in the Mississippi Supreme Court,[4] and amended his complaint so as to pray for more than $3,000 damages (R. 56–57), the case was removed to the United States District Court (R. 57–58). Respondent filed a number of special pleas (R. 65–77), and in addition a plea in abatement, alleging that petitioner had failed to appear at the appeal before the general superintendent of the railroad, had never requested any decision from higher officers of the

---

reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present and to have an employee of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders, shall be reinstated and paid for all time lost.

[4] See *Moore* v. *Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593.

carrier, and that the dispute had not been referred to the First Division of the National Railroad Adjustment Board (R. 60–62). The District Court overruled these pleas (R. 86–94), and after hearing the evidence entered a judgment in favor of the petitioner (R. 200–204). The Circuit Court of Appeals reversed, holding that the case was barred by the three-year statute of limitations for oral contracts and that the prior decision of the Mississippi Supreme Court that the six-year statute applied was not binding upon it (R. 217–224). The court also considered the other defenses and held that the petitioner was not required to go to the Adjustment Board before seeking redress in the courts (R. 225–226).

ARGUMENT

The National Railroad Adjustment Board, established by Section 3 of the Railway Labor Act, as amended in 1934, is a board composed of an equal number of representatives selected by the carriers and by the national labor organizations of railroad employees. The Board consists of four divisions, each having jurisdiction over certain crafts and classes of employees. The jurisdiction of the Board is limited to grievances and cases involving the interpretation or application of agreements concerning rates of pay, rules or working conditions. Major disputes as to what such rates of pay, rules and working conditions shall be are to be

handled by the National Mediation Board and the arbitration machinery set up elsewhere in the Act.

If a division of the Adjustment Board deadlocks upon an award, provision is made for the selection of a referee. The referee may vote as a member of the division. If a carrier does not comply with an order of the Adjustment Board, the person for whose benefit the order was made may file suit in a United States District Court and the findings and order of the Board are made *prima facie* evidence of the facts therein stated. The divisions of the Board are authorized to establish regional adjustment boards, and individual carriers or groups of carriers and their employees, acting through representatives, are authorized to establish system, group, or regional boards for the purpose of adjusting disputes which would otherwise go before the national board.

1. THE ACT ITSELF

The Act nowhere states whether or not the jurisdiction of the Adjustment Board to interpret railroad labor agreements or to hear grievances arising out of them is to be exclusive or that the courts are, or are not, to be ousted of jurisdiction over such matters.

Section 3, First (i), of the Act provides that disputes growing out of grievances or the interpretation or application of agreements:

> * * * *shall* be handled in the usual manner up to and including the chief operating

> officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred * * * to the appropriate division of the Adjustment Board * * *. [Italics supplied.]

This language we submit is consistent with either interpretation of the statute. As the court below held (R. 225), the mandatory "shall" for handling matters through the operating officers of the carrier may reasonably be regarded merely as a prerequisite to the institution of proceedings before the Board rather than as a statutory requirement that all disputes of this type be so handled. The use of "may" in connection with taking cases to the Board lends some support to this construction. On the other hand "shall" can be construed literally as applicable to all such disputes, and the failure to repeat the word in the following clause can be readily explained on the ground that parties were not to be required to seek review of the decision by the carrier officials by taking the case to the Adjustment Board, unless they saw fit.

Other provisions of the Act are of little help. Section 2 declares that the "General Purposes" of the Act are—

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (5) to provide for the prompt and orderly settlement of all dis-

> putes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

These pronouncements are entirely consistent with the notion that any other means of arriving at a peaceful settlement of such disputes, presumably including judicial proceedings, may be utilized, but they do not compel such an interpretation.

Few judicial decisions under the Railway Labor Act throw much light upon the present problem. Apart from the declaration by the court below in this case that recourse to the Adjustment Board is not a necessary prerequisite to the institution of judicial proceedings there has been no direct holding on the question by any federal court.[5] The Seventh Circuit Court of Appeals, in a case in which this Court denied certiorari, has indicated, by way of dictum, that it takes the same view. *Nord* v. *Griffin,* 86 F. (2d) 481, 483–484 (C. C. A. 7th), certiorari denied, 300 U. S. 673. In that case the court said:

> Nor do we believe that the Railroad Labor Act in any way limited the jurisdiction of the District Court as previously conferred by 28 U. S. C. A., § 41 (1). Section 3, subdivision (p), * * * provides: "If a

[5] There is a decision to the same effect by a Special Master in *In the Matter of Chicago & North Western Railway Co.* (N. D. Ill., No. 60,448), opinion of Special Master re Claim No. 1019, December 16, 1940.

> carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides * * * a petition," etc. The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied.

Other decisions touching upon different phases of the Adjustment Board's activities also seem to reflect an assumption that the courts are not deprived of jurisdiction over cases arising out of railway labor contracts.[6] The Final Report of the Attorney General's Committee on Administrative Procedure declares that "The courts have held that they [employees] may assert contract claims against carriers directly in court" (p. 188).

---

[6] See *Burke* v. *Morphy*, 109 F. (2d) 572 (C. C. A. 2nd), certiorari denied, 310 U. S. 635; *Malone* v. *Gardner*, 62 F. (2d) 15 (C. C. A. 4th); *Parrish* v. *Chesapeake & Ohio R. Co.*, 62 F. (2d) 20 (C. C. A. 4th); *Yazoo & M. V. R. Co.* v. *Webb*, 64 F. (2d) 902 (C. C. A. 5th); *McDermott* v. *New York Central R. Co.*, 32 F. Supp. 873 (S. D. N. Y.); *Cook* v. *Des Moines Union Railway Co.*, 16 F. Supp. 810 (S. D. Iowa); *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204 (N. D. Tex.). The opinion of the Supreme Court of Texas in *Mansell* v. *Texas & Pacific Ry. Co.*, 137 S. W. (2d) 997, contains a suggestion that the Board's jurisdiction may generally be exclusive, but not when the cause of action arose before the 1934 amendment to the Railway Labor Act. The facts of both the *Mansell* case and the present case fall within the latter category.

It can be argued that the establishment of the Adjustment Board in itself manifests a congressional intention that all disputes coming within its jurisdiction be submitted to it rather than to the courts.[7] But an equally impressive case can be made for the proposition that the failure of Congress to declare that the Board was to have exclusive jurisdiction indicates that other remedies previously available were not to be destroyed.

Examination of the language of statutes creating other administrative bodies and of the decisions under them reveals the absence of any uniform legislative or judicial policy which might be controlling here. In some instances Congress has specified that an administrative remedy is to be exclusive, as in the National Labor Relations Act[8]

---

[7] A requirement that parties first resort to the Adjustment Board does not mean that a proceeding based upon the Railway Labor Act will not eventually be heard *de novo* in court. Section 3, First (p), of the Act provides that the successful party before the Board may sue in the District Courts and that the suit shall proceed as other civil suits, except that the findings of the Board shall be *prima facie* evidence of the facts therein stated. Cf. *Cook* v. *Des Moines Union Railway Co.*, 16 F. Supp. 810, wherein the District Court granted greater relief than that approved by the Board. It has also been held that parties who have lost before the Board may still sue on their original contract rights, although this has not been conclusively determined. See *Stephenson* v. *New Orleans and N. E. R. Co.*, 180 Miss. 147, 177 So. 509, where the state court held that the Adjustment Board had had no jurisdiction and enjoined compliance with its ruling.

[8] c. 372, 49 Stat. 449, 29 U. S. C., Section 160 (a); *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

and the Longshoremen's and Harbor Workers' Compensation Act.[9] Frequently it is clear from the fact that the statute regulates an entirely new field that only statutory remedies are to be available.[10] On the other hand, Congress has also specifically provided, as in the Interstate Commerce Act,[11] the Civil Aeronautics Act [12] and the statutes administered by the Securities and Exchange Commission,[13] that existing remedies are not to be abridged. And some statutes, such as the Safety Appliance Act,[14] which contain no express provision one way or the other, have been construed as permitting private persons to enforce their rights in courts as well as before the administrative tribunal. It has been held that even where, as in the Interstate Commerce Act, the statute contains an express proviso that—

> * * * nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute,

---

[9] c. 509, 44 Stat. 1424, 33 U. S. C., Section 905.

[10] See, e. g., Bituminous Coal Act, c. 127, 50 Stat. 72, 15 U. S. C., Sections 828–851; Packers and Stockyards Act, c. 64, 42 Stat. 159, 7 U. S. C., Sections 181–231.

[11] c. 104, 24 Stat. 379, 49 U. S. C., Section 22.

[12] c. 601, 52 Stat. 973, 49 U. S. C., Section 676.

[13] c. 38, 48 Stat. 74, 15 U. S. C., Section 77 p; c. 411, 53 Stat. 1149, 15 U. S. C., Section 77 www (b); c. 404, 48 Stat. 881, 15 U. S. C., Section 78 bb; c. 687, 49 Stat. 803, 15 U. S. C., Section 79 p.

[14] c. 160, 36 Stat. 298, c. 225, 35 Stat. 476, 45 U. S. C., Sections 15, 19; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39.

> but the remedies of this act are in addition to such remedies.

questions of "administrative power and discretion" must first go to the Commission rather than to the courts in order to avoid a result inconsistent with the general policy of the Act. *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, 123–124; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

This variety of statutes and decisions merely shows that the present problem cannot be solved by any automatic rule pursuant to which a statute establishing an administrative body is inevitably construed in one way or the other. In each case all of the manifold factors which guide courts in construing statutes are given consideration, and the determination made by the court as to what Congress would have intended in the particular statute before the court.

When a statute creates new rights and establishes an agency to administer them, it may normally be presumed, even in the absence of express language to that effect, that the legislature intended the agency to have exclusive primary jurisdiction. But the Adjustment Board does not administer or pass upon rights created by the Railway Labor Act, but upon contract rights previ-

ously recognized and enforced in other forums. The Board is also not strictly comparable to other administrative bodies, in that it stems from boards established by agreement whose functions were clearly the settlement of disputes through adjustment rather than adjudication. See pp. 17–25, *infra*. It is conceivable that Congress could have designed the Adjustment Board either as a supplement to or a substitute for the existing remedies for breach of railway labor contracts. In view of the inconclusiveness of the Act upon this point, it is necessary to turn to secondary sources, such as the general purposes and background of the Act in order to determine how it should be construed.

2. THE IMMEDIATE LEGISLATIVE HISTORY OF THE 1934 ACT

The committee reports [15] and the debates on the floor of Congress [16] do not amplify the language of the Act, insofar as specific evidence of legislative intention on the present question is concerned.

At hearings before committees of the House and Senate the proposed amendments to the Railway

---

[15] H. Rept. No. 1944, 73d Cong., 2d Sess.; S. Rept. No. 1065, 73d Cong., 2d Sess. See pp. 24–26, *infra*.

[16] The only remark which might seem to bear upon the question is that of Representative Mead, supporting the bill, who stated that "* * * this bill sets up an orderly procedure for the settlement of grievances and disputes that arise upon the railroads of the country. It augments and supplements existing law; * * *" (78 Cong. Rec. 11718). This suggests that pre-existing judicial remedies were not to be destroyed.

Labor Act were explained and supported by the Federal Coordinator of Transportation, Mr. Joseph B. Eastman. His remarks do not at any point touch upon the relation of the Adjustment Board to the courts. He stated that "unadjusted disputes * * * *may* be referred" to the Adjustment Board, and that "nothing in the act shall be construed to prevent a carrier or group of carriers from agreeing with employees, or any class thereof, upon another method of settling disputes." [17]

But he does advance as one of the advantages of a national board, as contrasted with regional boards, the desirability of "a more uniform settlement of these disputes"; this he felt would ultimately "tend to reduce very materially the number of disputes which could not be settled locally." [18] In this connection he stated:

> I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the

---

[17] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess., p. 47.

[18] Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., pp. 154–155.

same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would be to establish guides which would enable a great many of the issues to be settled at home.[19]

* * * * * *

Furthermore, I have the feeling that it is very desirable to have a more uniform settlement of these disputes. These matters that we are now dealing with are grievances. They are not the basic rates of pay or the basic working rules and the interpretation of those rules or grievances which men have, and it doesn't seem to me that it is necessary to have any number of different ways of disposing of those all over the country, and that the national board could soon set certain precedents which would discourage and limit the number of such disputes which would arise, because it would be perfectly clear what the outcome would be if they were preferred to the national board.[20]

Uniformity in applying railway labor agreements is, of course, more likely to be achieved if all disputes must first go to a national board rather than to the numerous state and federal courts. Thus, although Mr. Eastman was speaking only of

---

[19] House Hearings, *supra*, p. 48.

[20] Senate Hearings, *supra*, p. 155.

the advantages of national over regional adjustment boards, his remarks are also pertinent here.

The fact that there was no reference to judicial remedies during the entire legislative discussion suggests both that the courts have not cut a very important figure in resolving this type of dispute and also that some other method of settling such disputes is essential. But the establishment of special machinery to fill this need does not in and of itself manifest an intention, one way or the other, to deprive the courts of any jurisdiction which they may formerly have possessed. Judgment on that question can be exercised more intelligently in the light of the historical background of the Adjustment Board and the relationship between its predecessors and the courts.

3. THE HISTORICAL BACKGROUND

The present Board is the culmination of a long period of practice and experimentation in devising means of settling railway labor disputes without interruption to transportation. The status of the Board, which is unique among administrative agencies (if it be such an agency at all; see p. 31, *infra*) can only be understood in the light of this historical background.

The first predecessor of the Adjustment Board was the "Commission of Eight" created on March 19, 1917, by agreement of the railroads and the four train service Brotherhoods, to interpret an award

of the Committee of the Council of National Defense settling the eight-hour day controversy.[21] This commission was composed of four representatives of the Brotherhoods and four of the carriers.[22]

Shortly after the Government took over the railroads during the war, the Director General of Railroads, by order, established Railway Board of Adjustment No. 1, which was in substance and form a continuation of the Commission of Eight for train service employees.[23] The order, which made effective a "memorandum of understanding," previously reached between the Brotherhoods and the "directors for the railroads under government control," provided that "all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government *shall* be disposed of in" the manner described.[24] Deadlocked cases were referable to

---

[21] See *Compilation*, pp. 403–404, and Appendix, pp. 18–19; Wolf, *The Railroad Labor Board*, pp. 50–57. The award was expressly made to become effective whether or not the Adamson Act was held constitutional. Although the settlement was obviously agreed upon before the decision of this Court in *Wilson* v. *New*, 243 U. S. 332, it was signed on March 19, 1917, the same day that the decision was rendered.

[22] *Compilation* and Wolf, *loc. cit. supra.*

[23] See Wolf, *supra*, pp. 50 *et seq.; Compilation*, Appendix, pp. 19–22.

[24] The Board consisted of an equal number of representatives of the carriers and the labor organizations. Section 10 of the memorandum, in language similar to that in the pres-

the Director General; "but practically every case" was amicably settled by a majority vote of the Board.[25] During succeeding months two similar boards were established for the shopcrafts and for other national labor organizations.[26]

This machinery was recognized as applicable only to the members of the major railway labor organizations signatory to the understanding.[27] By order of the Director General the cases of "employees not represented by Railway Boards of Adjustment" were to be handled by the individual or his representative in the same manner through the chief operating officer of the carrier, and then, if

---

ent Act, provided that "Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes * * * covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or someone officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer" then the matter shall be jointly submitted to the board of adjustment. In the proceedings before the Board the employees were to be represented by the person designated by the chief executive officer of the organization concerned. *Ibid.*

[25] See *ibid; Report of the Director General for the Fourteen Months Ending March 1, 1920*, p. 15.

[26] *Compilation*, Appendix, pp. 23–30; Wolf, *supra.*

[27] Wolf, *supra*, pp. 52–53.

not settled, submitted to the Division of Labor of the Railroad Administration.[28]

These orders became inoperative after the carriers were returned to private ownership. Railway labor relations were subsequently governed by Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456). Although it had been proposed that adjustment boards be made compulsory, Section 302 of the 1920 Act provided only that—

> * * * Railroad Boards of Labor Adjustment *may* be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.[29]

Such adjustment boards were to hear cases submitted by the carriers or labor organizations, or "upon the written petition signed by not less than 100 unorganized employees" (Section 303). If no adjustment board was established, or if an adjustment board failed to reach an agreement, the dispute was to be submitted to the Railroad Labor Board (Section 307).[30]

---

[28] *Compilation*, Appendix, pp. 30–32.

[29] *Compilation*, Appendix, p. 33; Wolf, *supra*, pp. 91, 267.

[30] This Board was composed of three representatives of the public, three of management, and three of labor. Its functions are described in *Pennsylvania Railroad Company* v. *Railroad Labor Board*, 261 U. S. 72; *Pennsylvania Railroad System and Allied Lines Federation* v. *Pennsylvania Railroad Company*, 267 U. S. 203; *Texas & New Orleans Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

Although the Act was passed in the belief that adjustment boards would be established, the carriers and the labor organizations were not able to agree upon whether national or system boards should be created.[31] Accordingly, no general system of adjustment boards was set up. One result of this was that the Railroad Labor Board was swamped with a vast number of minor cases and was unable to devote adequate time to the larger issues with which it was expected primarily to deal.[32]

Three regional adjustment boards, however, were created, by agreement between the four train-service brotherhoods and many of the carriers. These agreements were substantially similar to those entered into during the War; they provided that disputes "shall be" disposed of in the manner provided. Unsettled cases were to be certified to the Railroad Labor Board.[33]

In 1926, after the break-down, for many reasons,[34] of the machinery established in Title III of the

---

[31] Wolf, *supra*, pp. 267–273. As in 1934, the employees sought a national board and the carriers system boards.

[32] *Ibid.*

[33] Wolf, *supra*, pp. 273–276; *Compilation*, Appendix, pp. 39–53. The agreements conformed to the statute in that, after submission to the chief operating officer of the carrier, disputes could be filed with the Board either by the chief of the labor organization or by petition of 100 unorganized employees.

[34] See Wolf, *supra*, pp. 358 *et seq.*; *Texas & New Orleans Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 563; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 542.

Transportation Act, the Railway Labor Act was enacted in its place (44 Stat. 577). Section 3 of this statute appeared to make the establishment of adjustment boards mandatory; it provided that—

> * * * Boards of adjustment *shall* be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.[35]

The section went on to state that disputes of the type here in question "shall be handled in the usual manner up to and including the chief operating officer of the carrier * * *; but, failing to reach an adjustment in this manner, that the dispute *shall be referred* to the designated adjustment board by the parties, or by either party * * *" (Section 3, First (c)).

As might have been anticipated, the change from "may" to "shall" in the 1926 Act did not in itself succeed in bringing agreement between carriers and employees as to the kind of adjustment board to be created. The carriers still insisted on system

---

[35] The labor organizations had previously supported the Howell-Barkley bill which was favorably reported to the Senate in 1924, but which failed to pass. See Senate Report No. 779, 68th Cong., 1st Sess.; Wolf, *supra*, pp. 406–415. This bill provided for national adjustment boards. Presumably the substitution in the 1926 bill of the provision for the establishment of boards by agreement only was a concession to the carriers in order to get them to join with the labor organizations in submitting the latter bill to Congress.

boards and the Brotherhoods on a national board.[36] The boards previously established for train service employees were continued, however, and a new board created for the southwestern region.[37] In addition, a number of system boards were created for other classes of employees.

But in many instances the carriers and the employees were unable to reach agreement on whether

---

[36] The situation was picturesquely described by Chairman Winslow of the Board of Mediation before the Senate Committee on Interstate Commerce, at the Hearings on the 1934 amendments (Hearings on S. 3266, 73d Cong., 2d Sess., p. 137), as follows:

"The provision in the present act for adjustment boards is in practice about as near a fool provision as anything could possibly be. [Laughter.] I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree? No way has yet been found, where difficulties have come up. But the curious part is that they can work entirely within the provisions of law and never agree, so you never get an adjustment board. Side A, for instance, wants a system board. Side B wants a regional board, to illustrate And they are both subscribing to that provision of law; they both want boards; they are broken-hearted to think that they can't get them [laughter], but they never will agree on the board. So what good is it? It is utterly impractical and absolutely a mess. * * *"

[37] *Compilation*, p. 410; Appendix, pp. 57–61. The new train service agreement was substantially the same as the earlier ones, except that it omitted the provision required by the 1920 Act for submission of cases by unorganized employees (*Ibid.*). The older agreements were modified so as to make unsettled cases referable to the Board of Mediation instead of to the Railroad Labor Board and so as to indicate that only organizations party to the agreement could submit cases to the Board (*Id.*, at 47, 49, 54, 56).

or not to establish boards of adjustment. See H. Rept. No. 1944, 73d Cong., 2d Sess., p. 3. Moreover, the 1926 Act contained no machinery to care for the cases in which the carrier and labor members of the Boards, who were equal in number, failed to agree. As a consequence, "Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked" (H. Rept. No. 1944, 73d Cong., 2d Sess., p. 3). The Board of Mediation was flooded with these deadlocked cases, to be handled through mediation in addition to its other duties.[38] The result of the failure of the parties to agree to establish adjustment boards, or of the members of such boards to reach decisions was that, "unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment" (H. Rept. 1944, p. 3).

Because of these deficiencies in the operations of the 1926 Act, the 1934 amendments to the Railway Labor Act were adopted (48 Stat. 1185, 45 U. S. C., Sections 151–163). The House committee report, after reciting the above facts (which are

[38] See the testimony of Chairman Winslow before the House Committee on Interstate and Foreign Commerce (Hearings on H. R. 7650, 73d Cong., 2d Sess.), p. 72.

amply supported by the testimony before the congressional committee [39]) went on to declare—

> This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties. [Italics supplied.]

When the carriers and employees could agree to establish similar regional or system boards,[40] they were to be "exempt from the jurisdiction of this national board" (*id.*, p. 4). If a board deadlocked on a decision, impartial referees were to be chosen by the board members, or if necessary, by the Mediation Board. The House committee report concludes—

> The committee is confident that this bill strengthens the Railway Labor Act, where it is necessary to do so, and feels sure that if the act is amended as proposed in this bill, it will provide effective and adequate machinery to adjust controversies between the

[39] See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess.; Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess.

[40] The representatives of the employees had insisted on a national board while the carriers had proposed compulsory regional boards. The Act provides for the former and permits the latter.

carrier managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace.

It is clear from the above outline of the background of the present statute that Congress created the National Railroad Adjustment Board as a successor to the boards established by agreement under earlier statutes. These agreements contained mandatory language, and under the law of contracts the boards therein established might for that reason be said to have exclusive primary jurisdiction over cases arising under contracts made by the parties to the agreement. It is inferable that Congress did not intend the new national board to have a narrower jurisdiction than its predecessors, and that accordingly, resort to the national board is also a necessary prerequisite to the institution of judicial proceedings. On the other hand it is possible to point to the substitution in 1934 of the less demanding "may" for the mandatory "shall" contained both in the earlier agreements and in the corresponding section (Section 3, First (c)) of the 1926 Railway Labor Act as manifesting a deliberate effort by Congress not to give the present board exclusive jurisdiction.

In this connection it should be observed that the agreements creating the earlier adjustment boards permitted only the labor organizations and not the individual employees to present matters to the

boards.[41] (See p. 18, footnote 24; pp. 19–21; p. 23, footnote 37, *supra.*) These boards thus did not assume to protect the rights of individual employees if not sponsored by the labor organization, although it is generally recognized that such persons, in the absence of express contractual provisions to the contrary, have enforceable rights under labor agreements.[42] Omission from the present statute of the requirement that cases be presented through the labor organization party to the agreement is some indication that individual employees were to be permitted to bring cases before the Board, and thus that the Board has jurisdiction over the whole field of disputes under railway labor agreements. But as we point out, *infra,* pp. 33–37, the Adjustment Board has in fact continued to operate along the same lines as its predecessors, and has refused to hear cases not submitted by the labor organizations. This, of course, weakens the inference which might otherwise be drawn as to the exclusive nature of the Board's jurisdiction under the present Act as contrasted with the earlier agreements.

4. THE PRACTICE OF THE COURTS

As has been suggested, it is not unreasonable to assume that Congress intended the present ad-

[41] As required by the 1920 statute, agreements made between 1920 and 1926 also permitted 100 unorganized employees to file cases with the boards.

[42] See Witmer, *Collective Labor Agreements in the Courts,* 48 Yale L. J. 195, 224 (1938).

justment board to occupy, in general, the same position *vis a vis* the courts in the railway labor structure as its predecessors. The practice of the courts in deciding cases under the prior statutes and agreements would thus be an indication as to whether the present Act was designed to deprive the courts of jurisdiction.[43]

In view of the thousands of cases which came before the earlier adjustment boards, it must be assumed that most disputes arising where agreements were in effect were submitted to the boards. It is difficult to ascertain how many or what proportion of the cases were taken directly to court instead of going through a board. An examination of the reported decisions does not, of course, give any accurate indication of this, since most law suits do not reach the stage of requiring an opinion by an appellate court. Nevertheless, such reported opinions afford the only clue available.

---

[43] Most of the Federal cases arising both before and after 1934 have already been discussed, *supra*, pp. 9–10. In *Pennsylvania Railroad Company* v. *Railroad Labor Board*, 261 U. S. 72, 84, this Court stated generally, with respect to Title III of the 1920 Act, that it "was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. *Courts can do that.*" [Italics supplied.] Although this remark was not directed at the adjustment board section of the Act, it does indicate in some slight degree that while the 1920 Act was in effect the jurisdiction of neither the Railroad Labor Board nor the adjustment boards was exclusive.

The cases may be grouped into several categories. There are—

(a) A considerable number in which the courts have assumed that they had jurisdiction to grant relief under railway labor contracts, without any reference to federal legislation or to the existence of an adjustment board.[44]

---

[44] See, e. g., *Lyons* v. *St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S. W. (2d) 933 (1937); *Mosshamer* v. *Wabash R.*, 221 Mich. 407, 191 N. W. 210 (1922); *Long* v. *B. & O. R. Co.*, 155 Md. 265, 141 Atl. 504 (1928); *Aden* v. *L. & N. Ry. Co.*, 276 S. W. 511 (1921); *Chambers* v. *Davis*, 128 Miss. 613, 91 So. 346 (1922); *Piercy* v. *L. & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923); *Henry* v. *Twichell*, 286 Mass. 106, 189 N. E. 593 (1934); *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705 (1934); *Gordon* v. *Hawkins*, 66 S. W. (2d) 432 (1933); *McCoy* v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); *Ryan* v. *N. Y. C. R. Co.*, 267 Mich. 202, 255 N. W. 365 (1934); *George* v. *C., R. I. & P.*, 183 Minn. 610, 235 N. W. 673 (1931); *L. & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936); *Moore* v. *Y. & M. V. Ry.*, 176 Miss. 65, 166 So. 395 (1936); *McGee* v. *St. Joseph Belt Ry. Co.*, 233 Mo. App. 111, 93 S. W. (2d) 1111 (1936); *Clark* v. *C., N. O. & T. P.*, 258 Ky. 197, 79 S. W. (2d) 704 (1935); *Franklin* v. *Penn-Reading Seashore Lines*, 122 N. J. Eq. 205, 193 A. 712 (1937); *Florestano* v. *N. P. R. Co.*, 198 Minn. 203, 269 N. W. 407 (1936); *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920). These cases arising before and after 1934 indicate the practice of the courts as to both the earlier adjustment boards and the present Board. Since the cases cited do not mention any adjustment board, we have included only cases involving train service employees, inasmuch as substantially all of this class of employees has been covered by adjustment boards ever since 1917. (See pp. 17–23, *supra*.)

(b) Cases holding that employees must exhaust procedural remedies set forth in labor agreements, including the provision for Adjustment Boards.[45]

(c) Cases holding that an employee can go to court without availing himself of the remedies described in the contract or under the Act, where for one reason or another such action would be futile.[46]

Although court decisions which do not discuss an issue lurking in the record do not carry much authority, the very fact that there had been numerous cases in the courts while the earlier boards were functioning is of significance in and of itself, if it be assumed that Congress intended the new board to occupy the same position in respect to the courts as did the old. A contrary inference can, however, be drawn from the rather fewer decisions requiring the use of the machinery provided in the contracts, on the theory that Congress intended the statute establishing the new board to have as great an effect as the agreements which it was replacing.

---

[45] *Harrison* v. *Pullman Company*, 68 F. (2d) 826 (C. C. A. 8th); *Bell* v. *Western Railway*, 228 Ala. 328, 153 So. 434; *Wyatt* v. *Kansas City Ry. Co.*, 101 S. W. 1082 (Tex. Civ. App.); *Swilley* v. *Galveston, etc., Railway*, 96 S. W. (2d) 107 (Tex. Civ. App.); *Matlock* v. *Gulf C. & S. F. Railway*, 99 S. W. (2d) 1056 (Tex. Civ. App.); *Reed* v. *St. Louis S. W. Ry.*, 95 S. W. (2d) 887; *Cousins* v. *Pullman Co.*, 72 S. W. (2d) 356 (Tex. Civ. App.).

[46] *Youmans* v. *Charleston & W. C. Ry. Co.*, 175 S. C. 99, 178 S. E. 671; *Long* v. *Van Osdale*, 26 N. E. (2d) 69 (Ind. App.); *Mallehan* v. *Texas & Pacific Ry. Co.*, 87 S. W. (2d) 771 (Tex. Civ. App.); *Ledford* v. *Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 306, 18 N. E. (2d) 568.

5. THE PRACTICE OF THE PRESENT BOARD

The National Railroad Adjustment Board established in 1934 differs in important respects from the boards upon which it was modeled. Although its members are still appointed and paid by the carriers and the labor organizations, it is created by statute and not by agreement, and the remainder of its staff must be approved and paid by the Government, through the National Mediation Board. When it deadlocks, referees are to be chosen, if necessary, by the Mediation Board. Its decisions are made enforceable in court, the findings of the Board being *prima facie* evidence of the facts found.

As a result of these differences, it is uncertain whether the Board may any longer be treated merely as "an extension of the machinery for settling disputes on the property of the carriers" or whether it has become a full-fledged administrative agency with adjudicatory functions.[47] On this question the carrier and labor members of the Board apparently disagree, the labor members taking the position that the Board "never was intended to function as a court of equity, but rather that it should operate as a continuation of the conference room method employed upon the various properties."[48]

---

[47] See Attorney General's Committee on Administrative Procedure, Monograph No. 17, pp. 8–10, *Compilation*, p. 230–231; *id.*, Final Report, p. 185.

[48] *Ibid.*

This difference in analysis is not academic. It cuts across various facets of the Board's procedure and operations and is inevitably reflected in the problem now before this Court. For as a result of the view that the present Board, like its predecessors, is an adjustment, and not an adjudicatory, body representing the organizations whose members compose it, the labor members of the Board have declined to permit the Board to hear cases not submitted by the union representing the majority of the craft involved.[49]

On this point, the study prepared by the staff of the Attorney General's Committee on Administrative Procedure declares:[50]

> *Assertions of claims.* The agreements entered into by the majority unions with the carriers are regarded by the unions as peculiarly theirs, although they apply not only to the employees of the carrier who are members of the union, but to the non-members as well. In some four hundred cases since the establishment of the Board individuals have

---

[49] The exclusive statutory authority of the majority to represent the entire collective bargaining unit in negotiating agreements does not extend to the presentation of individual grievances. Sections 2, Fourth, and 3, First (j). Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 548, 557. The National Labor Relations Act, which was modeled on the Railway Labor Act (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 266–267) so provides in express language (Section 9 (a), 49 Stat. 449, 29 U. S. C., Sec. 159).

[50] Monograph No. 17, *supra*, pp. 15, 16, *Compilation*, pp. 233–234.

sought to assert claims before the Board. With the exception of a few isolated cases of Division IV involving claims of individuals where there was no organization of the particular craft or class on the property, no case asserted by an individual has ever been decided on the merits by the Board. The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board.

The Board does not affirmatively take the position that claims of individuals may not be asserted before it. The labor members solidly vote in each instance not to consider claims asserted by individuals, while the carrier representatives consistently vote to consider them, even though they are claims asserted against the railroads, basing their position upon "the constitutional right of the individual." Whatever the reason may be, each division of the Board deadlocks on the question whether or not to consider individuals' claims, and since this question has never been resolved by the appointment of a referee, it is simply stalemated.[51] Hence, no affirmative action is taken and no awards are made.[15]

[15] The secretary of Division I says that he has been instructed that he is not to inform individuals

[51] Only after the Attorney General's opinion of February 19, 1940, were referees appointed to break deadlocks on jurisdictional questions (See Opinions of Attorney General, Vol. 39, No. 113; Attorney General's Committee on Administrative Procedure, Monograph No. 17, p. 24, *Compilation*, p. 238.)

> who seek to petition the Board that the Board will not consider claims asserted by individuals. He therefore uses his ingenuity in explaining reasons for rejecting cases, and is forced to write many equivocal letters. If a party or his representative comes into the offices of the Board, however, the secretary tells him orally and confidentially the reason for refusing to docket the case.

Since the issuance of the report, the Second Division of the Board, sitting with a referee, has formally held that it lacked jurisdiction to hear cases brought by an individual, on the ground that the provision in the Act that "disputes shall be handled in the usual manner" before the carrier required that grievances be taken up through the union committee, even when the union was allegedly discriminating against the particular employee because of his failure to pay dues. See *Gooch* v. *Ogden Union Railway*, N. R. A. B., 2nd Div., Award No. 514.

Under these circumstances it might not unreasonably be assumed, that the unions representing the majority in a craft would naturally be less anxious to bring before the Board the individual grievances of non-members or members not in good standing than those of their members.[52] In this

[52] We do not mean to suggest that the labor organizations never bring the cases of non-members before the Board. They are more likely to do so, however, when the case involves a general principle applicable as a precedent to all in the craft than when it involves a seniority or discharge question limited in effect to the individual, or when the position of the individual nonmember is frequently adverse to members of the organization. See *e. g.*, *Ledford* v. *Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568.

connection it should be noted that certain groups of employees, such as Negroes, are ineligible for membership in many of the railway labor organizations.[53]

Whether or not the refusal of the Board to hear cases not filed by the labor organization is in conformity with the statute,[54] it must be reckoned with here as a fact. The consequences of a ruling that the creation of the Adjustment Board ousted the courts of jurisdiction would, at least under current practice, be to leave remediless individual employees or groups of employees whom for any rea-

---

[53] *Louisville Lodge, No. 10, Association of Colored Railroad Trainmen* v. *National Railroad Adjustment Board, First Division* (N. D. Ill., No. 45687), decided February 8, 1937, 1940, is a case in which a labor organization of Negroes complained that the Board would not hear its complaint as to discrimination against colored employees. The case was dismissed on the grounds that the United States District Court lacked jurisdiction to issue a writ of mandamus. See William H. Spencer, *The National Railroad Adjustment Board*, *supra*, p. 40, reprinted in *Compilation*, Appendix, p. 190.

[54] Two circuit courts of appeals have indicated that they disagree with the view that individuals have no right to appear before the Board, except through the labor organizations. *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th), certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Company*, 89 F. (2d) 768 (C. C. A. 5th). The statute declares that the Board shall hear "disputes between an *employee* or group of employees and a carrier or carriers" (Section 3, First (i)), that "Parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect" (Section 3, First (j)), that notice of hearing shall be

son the labor organizations do not undertake to represent. It would be unlikely that such a person could afford to or would care to seek by mandatory injunction or mandamus to compel the Board, composed of the employee representatives who had originally refused to permit the case to be submitted and the representatives of the carrier whom he was opposing, to hear his case.

It is quite clear that, in the absence of a specific contractual limitation, individual employees and minority groups were previously able to protect their rights in court, regardless of the attitude of

---

given "to the *employee* or employees and the carrier or carriers involved" (*ibid.*), and that "*any person* for whose benefit" an award is made may sue on the award in a United States District Court (Section 3, First (p)). The language of the Act differs considerably, of course, from that of the earlier agreements, which expressly provided that cases could be submitted to the Adjustment Boards only with the consent of the chief officers of the signatory labor organizations, see pp. 18–23, *supra*. Mr. George M. Harrison, president of the Brotherhood of Railway and Steamship Clerks, who appeared in support of the 1934 Act on behalf of all the railway labor organizations, testified before the House Committee on Interstate and Foreign Commerce (Hearings on H. R. 7650, 73d Cong., 2d Sess., p. 83) as follows:

> * * * a question developed about whether or no an individual or a minority of individuals, collectively concerned in grievances would have the right under this bill to have their grievances passed upon by the board. * * * in connection with disputes to be decided by adjustment boards, it is clear that an employee may in person or by counsel of his own choosing, or other representation, take care of his individual grievances.
>
> So, it cannot be said then that an employee will be unable to get consideration of his grievances just be-

the majority organization, and that Congress did not intend the Railway Labor Act to abolish these rights.[55] The refusal of the labor members of the present Board to hear cases not filed by the organizations in effect imposes upon the Board the limitation contained in the older agreements (but not in the present statute) that cases could only be submitted by the chief officer of the labor organizations signatory to the agreement. Thus the practice of the Board in refusing to hear such cases is hardly compatible with the theory that its jurisdiction is exclusive.

SUMMARY AND RECOMMENDATION

The above review of those factors which must be considered in construing the Railway Labor Act

---

cause he does not happen to be a member of the group representing the majority, because this bill is not designed to prevent the adjustment of grievance cases. The bill is designed to bring that very thing about.

See, also, William H. Spencer, *The National Railroad Adjustment Board* (University of Chicago Press, 1938), p. 39, *Compilation*, Appendix, p. 189, where the author concludes that, "It would seem that the phraseology of the Railway Labor Act authorizes an individual employee to petition the Adjustment Board for relief."

[55] See notes 6, 44–46, 54, *supra*. Inasmuch as the ability to protect his contract rights may be a matter of economic life and death to an employee, it would not be unlikely that to construe the Act as giving exclusive control over such matters to the labor organizations representing the majority could be used by the unions as a method of forcing all employees into such organizations. This would not be in harmony with the statutory prohibition against a closed shop (Section 2, Fifth) which was deliberately adopted by Congress after considerable opposition (78 Cong. Rec. 12390–12393, 12402).

leads to conclusions which may be summarized as follows:

1. The language and legislative history of the Act are inconclusive as to whether or not resort to the Adjustment Board is to be required before the institution of proceedings in court.

2. The cases may be said to hold or assume that the jurisdiction of the Board is not exclusive.

3. A comparison of the Act with the earlier statutes and also with the original agreements establishing adjustment boards, both of which used mandatory language, leads to possible conflicting inferences, depending upon whether it is assumed that the slight difference in the phraseology of the Act was deliberately directed at the present problem or that the present adjustment board was to have the same jurisdiction as its predecessors.

4. Insofar as the purposes of the Act are concerned, it is probable that the existence of a single experienced body interpretating railway labor agreements in a uniform manner is conducive to harmony and to a decrease in the number of such disputes. And yet it cannot be said with any assurance that the availability of the ordinary judicial remedy for breach of contract would be likely to bring on industrial strife.

5. The practice of the Board in refusing to hear cases not submitted by the representative of the majority of a craft is not consistent with the notion that the Board has exclusive jurisdiction of the type of cases which come before it.

We believe that in view of all of the above considerations, the generally accepted principles of statutory construction do not compel the Court to reach either conclusion as to the exclusive jurisdiction of the Adjustment Board. In the absence of an adequate guide to the actual intention of Congress on this point, we think the controlling consideration should be the effect of the proposed interpretation upon the attainment of the objectives of the Railway Labor Act.

Even on this issue there is room for difference of opinion. The primary purpose of the Railway Labor Act is the settlement of disputes peacefully without interruption to transportation. Since judicial proceedings are a peaceful means of resolving disputes, the possibility of resort to the courts is not inconsistent with this basic objective. On the other hand, the uniform interpretation of such agreements by a single expert tribunal would eliminate the possibility of discrimination between men working on different parts of the same road or on different roads, and thus remove one cause of dissatisfaction and controversy.[56] Furthermore, com-

[56] See Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (*Compilation*, Appendix, pp. 110–135). The cases which come before the Board arise out of numerous technical rules with "intricate" interpretations. Attorney General's Committee on Administrative Procedure, Monograph No. 17, pp. 5–6, *Compilation*, p. 229; Garrison, *supra*, pp.

pulsory use of the machinery established by the statute will, except for those cases which go to referees, in substance result in the settlement of cases by agreement between the carriers and the unions. We believe that such a solution of a dispute is probably more consistent with harmonious labor relations than the peaceful but compulsory acceptance of judicial decisions.

We would have been inclined to argue more vigorously in support of this view if it were not for its possible injustice as applied to individuals whose cases the Board refuses to hear under its present practice. We think it clear that Congress did not intend the machinery established in the Railway Labor Act to deprive any individual or group of all means of protecting the rights granted under collective labor agreements.

A possible solution of this problem would be to permit court action by individuals who cannot, without the use of some mandatory process, bring their case before the Adjustment Board.[57] An employee who is not a member of the organization which presents such cases should not be required to do more

586–591 (*Compilation*, Appendix, 125–129). A definite advantage is to be derived from having such cases decided by persons familiar with the subject and its terminology, and not by persons having "no practical experience of railroading." Garrison, *supra*, p. 593 (*Compilation*, Appendix, p. 131).

[57] Injunctive relief was granted an individual employee under such circumstances in *Ledford* v. *Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 306, 18 N. E. (2d) 568.

than show that the union has declined to present his case.[58] Since the filing of proceedings with the Board by the individual would under such circumstances be futile, and since the Board generally does not issue a formal ruling declining jurisdiction,[59] to require a refusal by the Board itself would merely serve to exhaust the period of limitations in which a person would be able to sue in court.[60]

The history of the present case indicates that the petitioner probably is not a member of or in good standing with the officials of the labor organization representing his craft. (See R. 134, 165–167, 181–184.) He had previously attacked the fairness of its seniority roster and been expelled from the union for failure to pay dues. Thus, although it does not appear whether or not the organization was requested to take his case, he might not unreasonably

[58] This might not be necessary or advisable as to members, since they might be deemed to have agreed to permit all disputes to be handled through the officers of their organizations.

[59] See p. 33, *supra*.

[60] These factors, we believe, make inapplicable the principle that a person cannot complain that an administrative remedy is inadequate until he has tried it. See, *e. g.*, *Lehon* v. *City of Atlanta*, 242 U. S. 53. An administrative remedy must be "adequate" (cf. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41); an "idle ceremony" will not be required. *Long* v. *Van Osdale*, 26 N. E. (2d) 69, 74, and cases cited, *supra*, note 46, p. 30. Just as long-continued refusal to act in a particular case warrants disregard of an administrative remedy (*Smith* v. *Illinois Bell Tel. Co.*, 270 U. S. 587), so should an admitted long-continued refusal to hear a certain class of cases.

have assumed, without asking, that it would have refused to have done so.[61]

In view of the uncertain state of the law as to the necessity of going before the Adjustment Board rather than suing in court, we do not believe that petitioner should be prejudiced by any failure to anticipate what this Court may now decide. If the Court should hold that the Adjustment Board has primary jurisdiction, except as to those cases which the Board declines to handle, we suggest that the Court not order that petitioner's complaint in this case be finally dismissed, but only that the judgment of the District Court be stayed, pending a request by petitioner that the union present his case, if necessary, to the higher operating officials of the carrier and then, if the matter has not been adjusted in good faith within a reasonable time, to the Board. Cf. *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422. If his case is then submitted to the Board the further action of the Board should be

---

[61] The record shows that petitioner presented his seniority complaint to a "Labor Board" in 1931, but that after seven years he had still heard nothing as to its disposition (R. 127, 134, 138). Since there was no known body of that name at that time, it is difficult to determine what "Labor Board" is meant, but we believe that the reference is probably to the Train Service Adjustment Board for the Western Region, to which the Illinois Central belonged. See *Compilation*, Appendix, p. 46. Although we have been advised that the records of that Board were transferred to the First Division of the National Railroad Adjustment Board in 1934, that Division has informed us that it is unable to find petitioner's complaint in its files.

awaited.[62] But if the union will not present petitioner's case to the Board, the District Court should then be permitted to enforce its judgment.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
ROBERT L. STERN,
Special Assistant to the Attorney General.

MARCH 1941.

---

[62] Petitioner's case would come before the First Division of the Adjustment Board, which has jurisdiction over yardmen. We think that the Court's attention should be called to the fact that this Division is now more than "three years behind in its docket" and "constantly falling further behind." (Attorney General's Committee on Administrative Procedure, Monograph No. 17, p. 36, *Compilation*, p. 244.)

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 550.—October Term, 1940.

Earl Moore, Petitioner,
vs.
Illinois Central Railroad Company.
} On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 31, 1941.]

Mr. Justice Black delivered the opinion of the Court.

We granted certiorari in this case, 311 U. S. —, to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case. Compare *Moore* v. *Illinois Central Railroad Co.*, 180 Miss. 277, with *Illinois Central Railroad Co.* v. *Moore*, 112 F. (2d) 959.

Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi state court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon appeal the Mississippi Supreme Court reversed and remanded. One of the railroad's pleas was that the contract of employment between Moore and the railroad was verbal, rather than written, and that any action thereon was therefore barred by the three year statute of limitations provided by Section 2299 of the Mississippi Code of 1930. With reference to this plea the Mississippi Supreme Court said: "The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which appellant could sue

is six years under section 2292, Code of 1930." *Moore* v. *Illinois Central Railroad Co., supra,* 291.

After the remand by the Mississippi Supreme Court, Moore amended his bill to ask damages in excess of $3000, and the railroad removed the case to the federal courts. The District Court, considering itself bound by state law, held that the Mississippi three year statute of limitations did not apply,[1] but on this point the Circuit Court of Appeals reversed,[2] declining to follow the Mississippi Supreme Court's ruling. Calling attention to the fact that the Mississippi Supreme Court does not regard itself as bound by a decision upon a second appeal, the Circuit Court of Appeals (one judge dissenting) said: "Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration." But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103, 107; cf. *West* v. *American Telephone & Telegraph Co.,* No. 44 this Term; *Fidelity Union Trust Co.* v. *Field,* No. 32 this Term. But the court below did not rely upon any change brought about by the Mississippi legislature or the Mississippi Supreme Court. On the contrary, it concluded that it should reexamine the law because there was involved the interpretation and application of a collective contract of an interstate railroad with its employees. The court below also based its failure to follow the Mississippi Supreme Court's decision in Moore's case on the ground that in an earlier case the Mississippi Supreme Court had said that the three year statute applied unless a contract was "wholly provable in writing," a situation which the court below

[1] 24 F. Supp. 731.

[2] 112 F. (2d) 959.

did not think existed here.[3] But even before the decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: "The construction given to a statute [of limitations] of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."[4] It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations.

But respondent says that there is another reason why the judgment in its favor should be sustained.[5] This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C. § 151, *et seq.* But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to section 153(i), which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—

[3] City of Hattiesburg *v.* Cobb Bros. Construction Co., 174 Miss. 20.

[4] Bauserman *v.* Blount, 147 U. S. 647, 654, quoting from Leffingwell *v.* Warren, 2 Black 599, 603. And see Balkam *v.* Woodstock Iron Co., 154 U. S. 177, 187.

[5] Cf. Helvering *v.* Gowran, 302 U. S. 238.

a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust. It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes "may be referred . . . to the . . . Adjustment Board . . . ." It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . . ." This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.[6] The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. But for failure to follow state law on the state statute of limitations, the judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is affirmed.

It is so ordered.

Mr. Justice FRANKFURTER concurs in the result.

---

[6] See, e. g., H. Rep. No. 328, 69th Cong., 1st Sess., p. 4.

END